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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1984

NATIONAL FARMERS UNION INSURANCE COMPANIES; and LODGE GRASS SCHOOL DISTRICT No. 27,

Petitioners,

vs.

CROW TRIBE OF INDIANS: LEROY SAGE, a minor; FLORA NOT AFRAID, his guardian; THE TRIBAL COURT OF THE CROW INDIAN RESERVATION: EDDIE ROUNDFACE, GLEN BIRDINGROUND, and IRA LEFT HAND, Judges of the Tribal Court of the Crow Indian Reservation; CROW INDIAN TRIBAL COUNCIL; and DONALD STUART, Chairman of the Crow Indian Tribal Council,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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QUESTIONS PRESENTED

1. Whether there is a federal claim for relief against Indian tribal governments that unlawfully assert civil jurisdiction over non-Indians.

2. Whether the Tribal Court of the Crow Indian Reservation has jurisdiction over claims that involve the State of Montana (or its subdivisions), that arise on state-owned land, and that occur in connection with activities that are compelled or encouraged by state and federal law or policy.

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INTEREST OF THE STATE OF WASHINGTON

In the State of Washington, there are twenty-five Indian Reservations. The population and land ownership patterns on these Reservations, which give rise to the

State's concern in this case, are not unfamiliar to this Court from previous cases.[1]

Much of the land on these reservations has passed into non-Indian ownership, pursuant to federal policies which, though initiated in the last quarter of the last century,[2] continue in their effect to this day. According to 1980 census data, some 79,000 persons live within twenty-three of these reservations, of whom some 16,000 are Indians, and the rest, some 63,000, are non-Indians.[3]

These reservation residents, Indian and non-Indian alike, require the same sorts of governmental services as all other residents of the State. Such on-reservation services include the provision of roads, police protection, schools and various social services. For example, in Washington there are over 40 separate school districts located in whole or in part within a reservation, serving over 7,000 Indian children.

The State of Washington, accordingly, has a two-fold interest in this case. First, it has a direct interest stemming from the on-reservation activities of its agencies and local

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[1]See *Puyallup Tribe v. Washington Department of Game*, 391 U.S. 392, at 395, n. 1 (1968), and 433 U.S. 165, at 174 (1977) (Puyallup Reservation); *Oliphant v. Suquamish Tribe*, 435 U.S. 191, at 193 n. 1 (1978) (Port Madison Reservation); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 143, 144 (1980) (Colville, Lummi, Makah, and Yakima Reservations); and *United States v. Mitchell*, ___ U.S. ___, 51 L.W. 4999, 5000 (1983) (Quinault Reservation).

[2]These policies were principally embodied in the General Allotment Act of 1887, 24 Stat. 388.

[3]See General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Table 71, "General Characteristics for American Indian Persons on Reservations and Alaska Native Villages," pp. 1-300 through 1-303. The classification in Table 71, it should be noted, allows only an approximation of tribal and non-tribal members, since some Indians may well not be members of the tribe on whose reservation they reside.

These non-member Indians are, vis-a-vis the Tribe, in the same legal status as non-Indians. Cf *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, at 161 (1980). And our concern, accordingly, extends to them as well. We shall, however, use in this brief the Census Bureau classification, "Indian" and "Non-Indian", rather than "member" and "non-member".

governments. To what extent do these activities subject those agencies and local governments to tribal jurisdiction of one sort or another?

Second, the State has a less direct, but no less important interest. It is the same interest as prompted the participation of the State Attorney General as amicus curiae in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Simply put, that interest is in protecting a large group of the State's citizens from the power of a tribal government in which they cannot participate in any way and whose actions, even when violative of the Indian Civil Rights Act, 25 U.S.C. § 1302 et seq., cannot be challenged in a federal court. After *Oliphant*, protection exists in the criminal area. But at least in the Ninth Circuit, little if any such protection exists in the civil area, as the opinion of the Ninth Circuit in this case demonstrates so strikingly.

REASONS FOR GRANTING THE WRIT

This case presents two separate, but closely related, questions. The first involves the existence of a remedy in federal court for an unlawful exercise of jurisdiction by a tribal court over a non-Indian. The second involves the criteria for determining whether such an exercise of jurisdiction is actually lawful or not. We believe that both questions merit review by this Court.

The reasons for reviewing the first question are fully set out in the opinion of Mr. Justice Rehnquist issued in chambers on September 10, 1984, staying the mandate of the court below until this Court's disposition of the Petition for Certiorari. ___ U.S. ___, 53 L.W. 3167. Similar and equally compelling reasons exist for reviewing the second question as well. The opinion of Mr. Justice Rehnquist provides the starting point for showing why this is so.

Under our system of government, there exist only two types of sovereigns, the Federal Government and the States.

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits

are under the political control of the Government of the United States, or the States of the Union. There exists in the broad domain of a sovereignty but these two.' " 53 L.W. 3167, quoting from *United States v. Kagama,* 118 U.S. 375, 139 (1886).

The power of each of these two sovereigns is subject to constitutional limitations, and this Court has the ultimate authority to determine whether either sovereign has exceeded those limitations in any given case. *Ibid.*

Under the result reached by the court below, however, Indian tribes, which are not true sovereigns, have become, as a practical matter, what might be called "super-sovereigns".[1] For under the opinion of the court below, the decisions of tribal courts as to the extent of their powers under federal law are off-limits to any scrutiny by the federal courts, including this Court. Such a result is "indeed anomalous". *Ibid.*

An anomaly no less disturbing than that described by Mr. Justice Rehnquist and very similar to it in character arises if a tribal court were to possess the broad jurisdiction over non-Indian persons and entities which the Crow tribal court has asserted in this case. For this reason, the second question as well should be reviewed.

Under our system of government in this Nation, there are not only external constraints on governmental power, i.e., constitutional limitations enforced by state and federal courts, but internal constraints as well, enforced through the political process, i.e., by the voters.

"A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them'." *Powell v. McCormack,* 395 U.S. 486, at 547 (1969). And as stated in *Nevada v. Hall,* 440 U.S. 410, 426 (1979), "In this Nation each sovereign governs only with the consent of the governed." For those persons, however, who lawfully reside on a reservation at the invitation of the United States (see, page 2, *supra*) this "fundamental principle" has become a

[1]This term is ours, not Mr. Justice Rehnquist's. But we believe it accurately expresses his point.

nullity. As non-members of the Tribe, they cannot participate in the exercise of the tribal governmental power to which they are now subject. And the Tribe is completely free, in the exercise of that power, from the political constraints which their participation would entail.

We are not here suggesting, of course, that school districts, such as the Petitioner here, should be allowed to vote, or that judges, tribal or otherwise, should be elected. Our point is much more fundamental. On-reservation non-Indian residents will inevitably be the targets of expanded tribal court jurisdiction of the sort exercised in this case. Such jurisdiction is presumably subject to the control of the tribal legislative body. But those non-Indian residents have no voice whatsoever within that legislative body. And thus freed of any internal political constraints, tribal government once again becomes a type of super-sovereign.

Further, this second sort of super-sovereignty, if allowed to stand, is likely to be more pervasive than the first. For it involves not just assertions of judicial jurisdiction, but legislative jurisdiction as well, as shown by previous decisions of the court below. That court has held, for example, that a tribe can impose a tribal building code upon property owned by a non-Indian reservation resident. See *Cardin v. DeLaCruz,* 671 F.2d 363 (9th Cir. 1982), *cert. den.* 459 U.S. 967 (1982). It has also held that a tribe can impose a tax upon the business of a non-Indian conducted upon his own property. *Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983) *cert. den.* ___ U.S. ___, 52 L.W. 3422 (1984). As these opinions demonstrate, as long as a Tribe can proffer a minimal interest in asserting jurisdiction over non-Indians, the Ninth Circuit will uphold that jurisdiction, and thereby confer the status of super-sovereign upon the Tribe.

One final consideration. Involved in both of the questions presented is the vexing issue of the applicability of *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) to claims of tribal violations of the Indian Civil Rights Act asserted by non-Indians. In this case, just as in *Snow v. Quinault, supra,* the court below has effectively made that

Act a nullity when it is invoked by non-Indians in a federal court in order to challenge the actions of a tribal court, as here, or of a tribal legislative body, as in *Snow*. Whether it is such a nullity is an important issue, which should be reviewed by this Court.

CONCLUSION

For the reasons given in the Petition for Certiorari, in the amicus brief of our sister states, and in this brief, the Petition for Certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of October, 1984.

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